

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
) Case Number
vs.) AU:23-CV-00853-DAE
)
GREG ABBOTT, *in his capacity as*) Austin, Texas
Governor of the State of Texas,)
and THE STATE OF TEXAS,)
Defendants.) January 19, 2024

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

Kimere J. Kimball
Mary F. Kruger
Landon Allen Wade
Andrew D. Knudsen (*via Telephone*)
Brian H. Lynk (*via Telephone*)
Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, DC 20044
(202) 514-2285; kimere.kimball@usdoj.gov

FOR THE DEFENDANTS:

Ryan Daniel Walters
Monroe David Bryant, Jr.
Munera Al-Fuhaid
Jacob Edward Przada
Office of the Texas Attorney General
Special Litigation Division
209 W. 14th Street, 7th Floor
Austin, Texas 78701
(512) 936-2714; ryan.walters@oag.texas.gov

1 COURT REPORTER:

Angela M. Hailey, CSR, CRR, RPR, RMR

2 Official Court Reporter, U.S.D.C.

262 West Nueva Street

3 San Antonio, Texas 78207

Phone (210) 244-5048

4 angela_hailey@txwd.uscourts.gov

5 Proceedings reported by stenotype, transcript produced by
6 computer-aided transcription.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (Friday, January 19, 2024, 11:04 a.m.)

2 * * *

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 COURTROOM DEPUTY CLERK: Austin, 23-CV-00853, United
6 States of America versus Greg Abbott.

7 THE COURT: Can we have appearances please?

8 MR. WALTERS: Your Honor, for the defendants, Ryan
9 Walters from the Attorney General's Office, with my colleagues
10 David Bryant, Munera Al-Fuhaid, Kyle Tebo and Jacob Przada.

11 THE COURT: Good morning.

12 MR. WALTERS: Good morning.

13 MS. KIMBALL: For the United States, I'm Kimere
14 Kimball from the Department of Justice. With me is Mary Kruger
15 and Landon Wade from the U.S. Attorney's Office, and on the
16 phone are Brian Lynk and Andrew Knudsen from the Department of
17 Justice.

18 THE COURT: Good morning to all of you. The reason I
19 called for the status conference is because the landscape in
20 this case has changed. I could say if I was a comedian, it's
21 ebbed and flowed, as different panels of the Court of Appeals
22 have had their hands on it. So we find ourselves in the
23 somewhat interesting position of having a -- to start things,
24 of course, we had a hearing, I issued a preliminary injunction,
25 the State appealed that. Then there was an administrative stay

1 issued by the Court of Appeals pending that appeal, then a
2 three-judge panel with two judges in the majority and one
3 dissenting affirmed my decision. Then recently the Fifth
4 Circuit vacated the panel's decision and took the case en banc.
5 So we don't know what will happen en banc, we have no idea, but
6 I think that we need to keep something in mind. The only thing
7 that is en banc at the moment is a preliminary injunction
8 order. It is not a trial on the merits. There has been no
9 full exploration in this court, and because it hasn't happened
10 in this court it cannot happen at the Court of Appeals level
11 even en banc on the facts. The only thing that the Court of
12 Appeals en banc can decide is whether the preliminary
13 injunction is or was appropriate, not the merits of the case.
14 Normally, Court of Appeals don't try lawsuits, that's a
15 function of the District Courts and I am concerned not at all
16 with the fact that this matter went en banc. I can assure you
17 that if you were to talk to any of my colleagues, they will
18 tell you that after the opinion came down from the Court of
19 Appeals affirming my decision, I said, *This is just the*
20 *beginning. This thing is going en banc, guaranteed, one*
21 *hundred percent guaranteed somebody will take it en banc.* And
22 that's exactly what happened. I have been a federal judge for
23 over 35 years, I've been sitting here in the Western District
24 of Texas now 12 years. I know the landscape, so I knew that
25 this was going to go en banc, particularly with the strenuous

1 dissent written by my friend Judge Willett, who by the way, I
2 have enormous respect for. Judge Willett is a brilliant legal
3 mind and a fine judge, and I have a lot of respect for Judge
4 Willett, so I don't want anybody to suggest otherwise. But we
5 need to get to the merits of this case sooner rather than
6 later. The United States maintains -- by the way, what is the
7 status of the buoy? I don't have any clear understanding. Has
8 that been brought to the side of the river or is it still out
9 where it was in the first place or has it been removed?

10 MS. KIMBALL: It's still where it was in the first
11 place, Your Honor.

12 THE COURT: It's still there.

13 MR. WALTERS: That's correct, Your Honor.

14 THE COURT: That's fine, because I think that my
15 original order was that it was to be brought to the bank of the
16 river, but then that was stayed administratively until the
17 decision. And then I did not -- between the time the decision
18 was entered and the time that the en banc would have been time
19 for them to vote on en banc, I could have ordered the State of
20 Texas at that point to move it because at that point I was
21 affirmed. I didn't do that for the very same reason I didn't
22 order the State of Texas to pull it out of the water, because I
23 understood, in my view, that it was going to go en banc. I
24 felt very sure of that, and I felt very sure that the panel's
25 opinion, the majority, would be vacated and we'd find ourselves

1 where we are today.

2 Now, in his dissent, in the original now vacated
3 opinion, which also vacates his dissent, vacates everything
4 having to do with that, Judge Willett did call attention to the
5 fact that if I was so convinced that this was a navigable
6 waterway, I should have ordered the buoys removed from the
7 water and put on the bank. Well, I think Judge Willett just
8 simply did not understand my rationale for not doing that.
9 This is an expensive endeavor, moving this buoy around, and I
10 was well aware that because of the nature of this case that it
11 was probably going to be litigated to the nth degree and that
12 likely there would be an en banc review ultimately. Probably I
13 thought of the preliminary injunction order, regardless of how
14 it went, and for sure any decision on the merits. And because
15 of that, I did not want the taxpayers of the State of Texas
16 having to pay to move that thing out of the water, and if the
17 Court ultimately directed that it be moved back, then go to
18 that expense. That's a lot of money we're talking about here.
19 And I thought that, yeah, it would probably have been a little
20 safer if it was by the bank than where it is now, but
21 nonetheless, I understood that -- with all these administrative
22 stays and then the administrative stay being lifted and we're
23 waiting for the en banc, this thing could have been taken in
24 and pulled out of the water twice. Why do that? Why do that?
25 Why cost the people of Texas those kinds of funds. I just did

1 not see the benefit of it, I didn't see the merit in it and
2 that was the reason. Not because I believe that what I said in
3 my order -- obviously, I wouldn't have written the order if I
4 didn't believe it was correct at the time, but I didn't have
5 all the facts in front of me, and so we are going to do that.
6 We are going to have a trial on the merits and we're going to
7 have it soon, very soon, because there is no need for this to
8 linger on.

9 There's no need for any extensive discovery here. The
10 parties have -- I'm going to give you a time to take some
11 additional depositions, but the parties have a clear -- this
12 has been going on long enough, the parties have a clear
13 understanding. We did have something of an evidentiary hearing
14 on the preliminary injunction, but the standard is different.
15 It's likelihood of success on the merits, it is not success on
16 the merits. There's a difference and a lot of District judges
17 forget about that. A lot of Circuit judges forget about that.
18 There's a different standard we're dealing with. And it may be
19 that after hearing all of the evidence, I may change my view
20 and find that this is not a navigable waterway of the United
21 States. I don't know. I'm going to keep an absolutely open
22 mind.

23 Now, there are a number of things that were called out
24 in Judge Willett's -- I may not have agreed with it, but it was
25 a very well drafted dissent that I think need to be addressed

1 as well as what was called out in the majority opinion. Even
2 though they're off the record, they do reflect some questions
3 that were raised and answered, okay, and these judges are
4 potentially going to be on the en banc panel, so I think we
5 better -- not this en banc. Whatever happens with the
6 preliminary injunction is whatever happens. I'm talking about
7 a judgment on the merits where people have a chance to bring in
8 their witnesses.

9 Now, for instance, there was allusion to the fact that
10 the Border Patrol regularly navigates that section of the river
11 in their Border Patrol boats on a regular basis, but no
12 evidence was presented to that effect because we were in a
13 preliminary injunction stage. If the United States contends
14 that the Border Patrol regularly navigates it, I want to hear
15 some evidence to that effect. If it's not navigable and nobody
16 navigates it, as the state contends, I want to hear evidence to
17 that effect.

18 I used to sit in Del Rio. I was on the wheel in Del
19 Rio for a year and a half. I know this section of the river.
20 I've seen boats going up and down it, but that isn't how I
21 decide cases, I'm not a witness. And that was some time ago,
22 by the way, not recently. That was eight years ago. The river
23 could have changed in those years, eight, nine years ago when I
24 was sitting down there.

25 So the Border Patrol contends -- because one of the

1 things that is potentially another lawsuit, not in front of me,
2 thank God, is the Border Patrol's contention that in this very
3 area, the State of Texas is precluding the Border Patrol not
4 only from accessing the river, but accessing their boat ramp.
5 You don't need a boat ramp if you don't have boats to put in
6 the water. So that's one of the things we need to figure out.
7 Are they really navigating the waterway now, or not? And of
8 course, there are many other issues that need to be addressed
9 in this trial that were not fully explored in the preliminary
10 injunction hearing. And so my view is that we need to address
11 these and address them quickly so that there can be some
12 resolution because I don't want us to get tied up with these
13 other cases. I mean, the United States has threatened to sue
14 Texas yet again over the alleged blocking of Border Patrol
15 agents to get access to the river in that area. I guess
16 there's a gate there or something, they've got National Guard
17 troops there. And then there's yet another lawsuit I think
18 between the United States -- isn't there another lawsuit going
19 on now?

20 MS. KRUGER: There is one, Your Honor, a suit over the
21 wire --

22 THE COURT: Oh, the wire, the barbed wire. There's a
23 barbed wire lawsuit. There's so many of these suits floating
24 around, and I didn't actually intend that to be a pun, but
25 there are so many of these suits around, I don't want this one

1 to get bollixed up in all that, okay. So we are going to have
2 our trial as early in March as we can, and that will give you a
3 month to get ready, which is more than enough time in this
4 instance. I don't see the trial lasting more than two to three
5 days. Can anybody disabuse me here?

6 MR. WALTERS: Your Honor, I think your estimate as to
7 two to three days is probably right. I would say that our
8 entire team is facing preliminary injunction hearing in two
9 lawsuits defending SB4, the State's immigration law that is
10 currently scheduled in this court before Judge Pitman for
11 February 13th.

12 THE COURT: Yes, but how many lawyers do you have?

13 MR. WALTERS: Well, Special Litigation has a total of
14 12, but we have the SB1 litigation that is ongoing.

15 THE COURT: That's why I'm giving you until March.
16 You'll be able to take care of it. I don't have any concern
17 about that. I've always gotten excellent briefing out of the
18 State of Texas. Some people are taking the position that this
19 Court never rules-- I've heard this from pundits, I've heard
20 this from pundits, that somehow this Court always rules against
21 the State of Texas. That's just absolutely fabricated and
22 false.

23 I will give you just one example, but there are many.
24 In the fetal burial case, the Tenth Circuit Court of Appeals
25 had ruled that an identical statute to the one that Texas had

1 passed was on its face unconstitutional. I had that case in
2 front of me. After looking at it carefully, I ruled in
3 opposition to the Tenth Circuit. People thought I was crazy,
4 but I said that I thought that Texas had the authority to, in
5 fact, pass such a statute and that the statute was
6 constitutional on its face. Now, I had to issue an injunction
7 order because *Roe vs. Wade* was still in effect, a temporary
8 order, because *Roe vs. Wade* was still in effect, and it wasn't
9 on the constitutionality of the statute, it was the fact that
10 there were no places to bury the remains. There were 50,000
11 abortions in Texas the year or two years before and there were
12 only two places that would accept fetal remains, and each one
13 of them would only accept less than a hundred, in the entire
14 State of Texas because of the difficulty. So the Court of
15 Appeals affirmed me on the issue of -- because in the meantime,
16 the United States Supreme Court had come down after I ruled
17 that the Tenth Circuit was wrong and I was right and the
18 statute was constitutional. So I was affirmed by the Fifth
19 Circuit there, and then the Fifth Circuit did not rule on the
20 last part of it. They were waiting for the Supreme Court to
21 rule on *Roe vs. Wade*. And because if they would have ruled *Roe*
22 *vs. Wade* constitutional, they would have affirmed me. If they
23 ruled that *Roe vs. Wade* was unconstitutional, I mean reversed
24 it, which they did, vacated *Roe vs. Wade*, then they would
25 simply vacate that part of my ruling. I said on the record the

1 reason I ruled the way I ruled is because I was compelled to by
2 *Roe vs. Wade*, which the panel of the Fifth Circuit understood.
3 Two years that sat there, then the Supreme Court -- two and a
4 half years it sat up there, and the Supreme Court finally ruled
5 that *Roe vs. Wade* -- vacated *Roe vs. Wade* and then that partial
6 part of my case was dismissed, as it should have been. So I
7 don't rule against the State of Texas or Governor Abbott
8 because I have something against the State of Texas, quite the
9 contrary. I look at things straight up the road, and I'm going
10 to keep an absolutely open mind when I hear this trial, and I
11 will decide it on whatever the evidence will be at the trial,
12 not at the preliminary injunction hearing. We're not going to
13 cobble in facts presented at the preliminary injunction
14 hearing. If you have a witness you need to present, you better
15 present them here. I don't care whether they were at the
16 preliminary injunction hearing. This is not a preliminary
17 injunction hearing, this is a trial on the merits. Okay?
18 Everybody understand that?

19 MS. KIMBALL: Your Honor, we absolutely agree and
20 agree with the expeditious timing of the trial. We do want to
21 note, though, we plan to disclose experts and just wanted to
22 make the Court aware of that.

23 THE COURT: That's why I'm giving you 30 days. If I
24 had my druthers, I'd have the trial tomorrow, you know, because
25 this is important. It's important for the people of Texas.

1 It's important for the people of the United States, and I need
2 to get this done, but I need to give you time to do your -- so
3 you disclose your experts, I want those disclosed within five
4 days, and we're going to have a trial at the end of March.

5 MR. WALTERS: Your Honor, could I request a
6 five-minute recess to talk with our clients?

7 THE COURT: Where's your clients?

8 MR. WALTERS: Right here, Your Honor, from the
9 Governor's office.

10 MS. KIMBALL: To be clear, you just mean the identity
11 or you mean the full report?

12 THE COURT: No, their identity. Five minutes?

13 MR. WALTERS: Yes, Your Honor.

14 THE COURT: I'll give you a few minutes. Go talk to
15 them. I'm not moving.

16 (11:24 a.m.)

17 * * *

18 (11:27 a.m.)

19 MR. WALTERS: Your Honor, if I could speak for a
20 moment?

21 THE COURT: Sure.

22 MR. WALTERS: Your Honor, our position is that moving
23 to a trial at this stage with all the other proceedings would
24 be a waste of this Court's time and agency resources at the
25 Attorney General's Office, as well as the Texas Military

1 Department and DPS. We're facing a potential lawsuit from the
2 federal government as you alluded to. We have cases up and
3 down the federal judiciary involving the concertina wire at the
4 border before Judge Moses that's currently in the Supreme
5 Court, but likely to be coming back down and moving forward in
6 the District Court. We have the Court immediately took en banc
7 review of this decision, and Judge Willett's dissent had not
8 only factual -- not only based on the factual record, but it
9 was at the PI record the issues of law that we think waiting
10 for the Fifth Circuit en banc's ruling could dispose of this
11 case as a matter of law going forward. So --

12 THE COURT: Well, look, Judge Willett's factual
13 findings such as they were had to have been based on the
14 record. And as far as the law is concerned, there is no law
15 that says -- listen, if anybody has read the Rivers and Harbors
16 Act, I can promise you it's me, multiple, multiple times.
17 There is nothing in the Rivers and Harbors Act that suggests
18 that absent a declaration from Congress, which there hasn't
19 been, decertifying this as being covered by the Rivers and
20 Harbors Act that as a matter of law you could rule that this is
21 not a navigable waterway if, in fact, it is being used and has
22 consistently been used as a navigable waterway.

23 Now, what Judge Willett has ruled could not stand at
24 the Supreme Court. I mean, if that's what he ruled, and he
25 didn't, by the way. Judge Willett did not say that the

1 Congress has exempted this part. All he said is that what the
2 government had presented to date, to date, in that hearing did
3 not show it, but that's at the preliminary injunction stage.
4 So with all deference to your client, the answer is no. These
5 litigations are never going to end, okay. There is never going
6 to be a time when you won't be in litigation. As long as
7 Governor Abbott takes the positions that he's taking and the
8 federal government takes the positions that it's taking, there
9 is never going to end -- this litigation will just continue and
10 because the government has threatened to file yet another
11 lawsuit. Look, let me tell you something -- you can be seated,
12 counsel.

13 MR. WALTERS: Thank you.

14 THE COURT: Let me tell you something, I am not at all
15 unsympathetic to the concerns raised by Governor Abbott. That
16 may surprise you. I am not at all unsympathetic to the
17 concerns raised by Governor Abbott about what is happening at
18 the border. Don't forget, you're not looking at somebody here
19 who has been known throughout his career as some flaming
20 liberal judge. I was appointed by President Ronald Reagan. He
21 did not appoint a lot of left wing, off-the-rails judges. My
22 view of things is that the Court should rule on the narrowest
23 grounds possible, federal judges should not be making law, they
24 should be interpreting the law, and the Constitution should be
25 interpreted in accordance with its original meaning. That has

1 always been my judicial philosophy. Now, that does not mean,
2 however, that if I find that the Constitution or federal law is
3 being violated, whether intentionally or unintentionally, I
4 won't enforce that. That is my duty. When I was nominated by
5 President Reagan, he called me on the phone. We talked, before
6 he nominated me. He used to do that. And he said to me in no
7 uncertain terms, he said, *"Will you pledge, will you pledge,*
8 *Mr. Ezra, to follow the Constitution of the United States, to*
9 *follow the law and to make an impartial decision regardless of*
10 *which way it falls?"* And I said, *"Yes, Mr. President, I will."*
11 I have tried my very best to keep that pledge to President
12 Reagan, and it's the same pledge I took when I took my oath of
13 office. I have nothing against Governor Abbott, now or ever.
14 I am just trying to determine whether a buoy put out in the
15 middle of the Rio Grande River violates the Rivers and Harbors
16 Act, that's it, or some other constitutional provision. That's
17 all there is to it. It has nothing to do with Governor Abbott.
18 I'm not here to either -- and I certainly don't criticize
19 Governor Abbott, never have. I thought that the suggestion and
20 I made that statement that predicating -- and even Judge
21 Willett did not accept this -- predicating the buoy on the
22 theory that there was a war between the United States and
23 illegal immigrants in the sense of a declared war of the United
24 States where somehow the governor or any governor could assume
25 the powers of the presidency and Congress, Congress has to

1 declare war. Franklin Delano Roosevelt, even though America --
2 believe me, I grew up very close to Pearl Harbor, even though
3 Pearl Harbor was bombed, thousands of Americans were killed in
4 an unmitigated and unjustified sneak attack. President
5 Roosevelt couldn't declare war himself, he had to go to
6 Congress and he made the very famous speech which we've all
7 seen hundreds of times. And Congress declared war on imperial
8 Japan, not President Roosevelt. So a governor can't declare
9 war, and Judge Willett didn't suggest that. Now, that doesn't
10 mean that I somehow have a personal animus toward Governor
11 Abbott, I don't. I absolutely do not. And I'm not going to
12 say I'm going to rule for the State of Texas or rule for the
13 government. I am going to look at this completely fresh. And
14 so can we have a trial date please?

15 COURTROOM DEPUTY CLERK: March 19th.

16 THE COURT: March 19, 2024.

17 COURTROOM DEPUTY CLERK: Yes, Judge, 9:00 a.m.

18 THE COURT: 9:00 a.m. Each side is to disclose their
19 experts within five days. Somebody looks like he's trying to
20 jump up and say something. It isn't going to change my mind on
21 the trial. Yes, sir.

22 MR. BRYANT: Your Honor, I would just point out that
23 there's an amended complaint that was filed and the motions to
24 dismiss --

25 THE COURT: The motion to dismiss is going to be

1 subsumed by the trial. I can't decide the motion to dismiss on
2 the facts that we have. The facts are highly contested, so the
3 motion to dismiss which you have filed, which -- by the way, by
4 filing a motion to dismiss, the State of Texas acknowledged
5 that I have not lost jurisdiction over this case simply because
6 there's an appeal in the Fifth Circuit of a preliminary
7 injunction, and that's a smart move on your part, by the way,
8 because that's well settled law.

9 MR. BRYANT: And Your Honor, we have not answered or
10 had a need to answer in this case yet, and so I think that
11 there are some preliminary things that need to happen before we
12 can go down the road quite as quickly as the Court --

13 THE COURT: You filed an amended complaint.

14 MS. KIMBALL: We did, Your Honor.

15 THE COURT: How much has changed in your amended
16 complaint?

17 MS. KIMBALL: We added the Treaty claim. The Rivers
18 and Harbors Act claim stayed exactly the same. We added a
19 claim that Texas's actions were contrary to the Treaty of
20 Guadalupe Hidalgo.

21 THE COURT: When is that answer due?

22 MS. KIMBALL: The motion to dismiss is currently fully
23 briefed and ready for disposition, so it will be due 15 days
24 after the decision on the motion to dismiss.

25 THE COURT: Well, I'm going to deny the motion to

1 dismiss without prejudice on the basis that there is no way I
2 can make a ruling on it on the facts of the matter today. The
3 Treaty of Hidalgo was part of the argument that was previously
4 made. This is not something new.

5 MR. WALTERS: Your Honor, that is a new claim and that
6 would be a pure question of law. Our motion to dismiss says
7 that the Treaty is not self-executing and that the United
8 States does not have a cause of action to enforce it. It's not
9 anything fact based in any way, so we think the Court could
10 rule on that and at least narrow the issues for any trial. To
11 have that just hanging out there when they've amended their
12 complaint and we haven't had an opportunity to answer, we
13 think --

14 THE COURT: I know what your answer is. It'll take
15 you five minutes to answer this complaint. It's the same
16 complaint except for the Treaty of Hidalgo.

17 MR. WALTERS: Well, Your Honor, our deadline to answer
18 has not arisen and will not arise until after you rule on our
19 motion to dismiss which has been fully briefed.

20 THE COURT: Well, all right. Here is what I will do.
21 I will withdraw my denial of the motion to dismiss. I will
22 make a -- I don't need any further argument on the Treaty of
23 Hidalgo. That really has already been briefed. And have you
24 submitted -- do we have all the papers on that? We do, don't
25 we?

1 MS. KIMBALL: Yes, Your Honor, it's fully briefed.

2 THE COURT: All right. I'm going to decide that
3 without further oral argument and I'll decide that promptly.
4 And so we will go forward from there. Okay? So regardless of
5 how I rule on that, we still have the other issue, so we still
6 need the trial. Unless I grant the motion on the Treaty of
7 Hidalgo, then that goes up on appeal. My concern is I don't
8 want this thing bouncing back and forth to the Fifth Circuit on
9 every issue with all kinds of unresolved issues. That's the
10 concern I have.

11 MR. WALTERS: Your Honor, I would like to also point
12 out that the other claim involving the Rivers and Harbors Act
13 we do have as a matter of law and I think fact specific in the
14 motion to dismiss that the State is not a proper object of
15 injunctive relief enforcement for the statute, so there are
16 both issues that are pure matters of law that could be disposed
17 of that are briefed in our motion to dismiss.

18 THE COURT: Okay, well, I will get those decisions out
19 as quickly as possible, probably right around the time we go to
20 trial. I'll get them out. Don't worry. Get ready for trial.
21 Okay? There will be a trial.

22 COURTROOM DEPUTY CLERK: Discovery deadline.

23 THE COURT: So I want disclosure of experts within
24 five days, both sides. You already know who your experts are,
25 I think, don't you? No? Okay. Well, you had some in the last

1 go-around. What happened to them?

2 MR. WALTERS: I don't believe we had experts in the
3 first go-around, we had fact witnesses.

4 THE COURT: You had some fact witnesses. I'll try to
5 get to the motion to dismiss sooner rather than later. And
6 then you'll need to file your answer immediately thereafter, if
7 it's necessary.

8 COURTROOM DEPUTY CLERK: Discovery is February 16th.

9 THE COURT: You're giving me the 50-mission stare,
10 counsel. Yes?

11 MR. BRYANT: Your Honor, I just want to raise a
12 possibility that the State may choose to assert a counterclaim
13 when it comes time for that answer, so that hadn't been
14 decided, that's just one lawyer's idea, and so I just wanted to
15 make the Court aware of it so that if it does come to pass, it
16 wouldn't be a surprise.

17 THE COURT: Okay. I don't know what kind of
18 counterclaim, but if you file one, you file one. They'll just
19 answer it very quickly and we'll go to trial. There are very
20 few mysteries in this case, okay, very few. We know what this
21 case is about and we've got this thing kind of floating around
22 out there. I don't think the governor has made any effort to
23 put any more in the water. Has he?

24 MR. WALTERS: No, Your Honor.

25 THE COURT: And people are walking around this thing,

1 to be honest with you, as I understand it. I mean, they're not
2 climbing over the top, right?

3 MR. WALTERS: That's right, Your Honor. There have
4 been no attempts to climb over the buoy. The buoy's purpose is
5 to channel people to other -- to the ports of entry, Your
6 Honor.

7 THE COURT: Well, they're not going to channel people
8 to many ports of entry. How big is the buoy? I can't remember
9 exactly, but it's not that large.

10 MR. BRYANT: A thousand feet approximately.

11 MS. KIMBALL: A thousand feet.

12 THE COURT: It's only 1000 feet. How long is the Rio
13 Grande in that area, about ten miles? If you start at the damn
14 and you work your way down?

15 MR. WALTERS: I would say, Your Honor, it's a sort of
16 force multiplier. We have the concertina wire which has
17 obviously been the subject of litigation and we have troops
18 along the border, so the combination of those things --

19 THE COURT: Well, Governor Abbott has maintained that
20 the reason he needs to close that gate is because the
21 concertina wire hasn't been effective, they've been cutting
22 through the concertina wire.

23 MR. WALTERS: Well, Your Honor, yes, the concertina
24 wire is not effective if the Border Patrol cuts through it in
25 ways--

1 THE COURT: No, I'm not talking about the Border
2 Patrol. I'm talking about the cartels and the people who bring
3 the people across.

4 MR. WALTERS: No, Your Honor.

5 THE COURT: Are you telling me that there's no problem
6 now with illegal immigration?

7 MR. WALTERS: No.

8 THE COURT: That the buoy and the concertina wire has
9 stopped people from coming across the border in the Del Rio
10 sector of Eagle Pass area? I don't think Governor Abbott made
11 that statement recently in his press conference.

12 MR. WALTERS: Well, I don't think that the test of
13 whether something is effective completely eliminates the
14 problem.

15 THE COURT: According to Governor Abbott, it not only
16 doesn't eliminate it, there's been an unprecedented huge number
17 of people flowing through every day.

18 MR. WALTERS: Yes, Your Honor, but --

19 THE COURT: I don't disagree with him. I think he's
20 right, there has been.

21 MR. WALTERS: But that's not inconsistent with
22 concertina wire --

23 THE COURT: It's inconsistent with the thought that
24 somehow the buoy is going to solve the problem. I don't think
25 Governor Abbott ever thought one buoy sitting there was going

1 to solve the problem, maybe a whole bunch of buoys, but one
2 buoy was going to solve the problem.

3 Look, let's not forget something here, Governor Abbott
4 was a State Supreme Court justice. People forget that. He
5 wasn't always a politician. Well, kind of a politician, I
6 guess, you get elected to the Supreme Court, but this is not a
7 stupid man here we're dealing with. He's very bright, and he
8 made statements recently which were highly publicized about the
9 concern about the huge number of people that continue to come
10 across the border illegally in this very area, this very
11 general area, and there's no question that they do. The
12 government doesn't suggest that, that's not what they're
13 arguing. They're not arguing that people aren't coming across.
14 Anybody who would make that argument is living in fantasy land.
15 People are coming across, and a buoy or barbed wire -- heck,
16 you know the fence they put up, now let's be clear here, part
17 of the fence was put up by the Obama administration. Then part
18 of it was put up under the Trump administration. They cut
19 through the fence. They cut right through the fence. You know
20 that, right?

21 MR. WALTERS: Your Honor, fences, if they are not
22 maintained -- it's part of a --

23 THE COURT: No, no, this has nothing to do with
24 maintaining the fence.

25 MR. WALTERS: They have to be guarded, Your Honor.

1 There's surveillance of the fences so that Texas National Guard
2 can go or Border Patrol because they also put up concertina
3 wire, so they don't think it's ineffective. In fact, they've
4 asked Texans to help them set up concertina wire along the
5 border.

6 THE COURT: I don't disagree with that. I'm just
7 saying that no one element is going to solve the problem. You
8 have dedicated people in Mexico, criminals who make a huge
9 amount of money trafficking human beings into the United
10 States, and if you don't think that they know how to get over
11 concertina wire or cut through these fences, which they do,
12 they cut through the fences. There was a big thing on 60
13 Minutes. Was it 60 Minutes or Sunday Morning where they had
14 somebody go out there and they just pushed the fence open
15 because somebody had cut through it. And then they were
16 showing where the fence had been rewelded. You have to have a
17 whole host of different measures in order to keep people out
18 and that includes if you believe in barriers. I'm not taking a
19 position on them, but you certainly need electronic
20 surveillance. You need surveillance, you need drones, you need
21 helicopters, you need the full gambit of things, but that's not
22 before me. I am not the governor of the State of Texas and I
23 wouldn't ever dream of running, believe me.

24 I am a federal judge. What is in front of me is
25 whether the waterway is navigable, whether the Treaty somehow

1 bars what Texas is doing, which I have some concern that it
2 doesn't because Texas -- well, Texas at one point there was
3 some allegation that this thing was over on the Mexican side of
4 the river. That's a no go, can't do that. But if it's on the
5 United States side of the river, that may be a serious problem,
6 but whether the Treaty bars it is another story. I don't know
7 about that. I'm not convinced at this point as a matter of law
8 that it does, but I have to look at that carefully. I may
9 change my view, but there are many other issues here, so we'll
10 get them all resolved.

11 I am not trying to put -- I used to play baseball, I
12 said that before, I'm not trying to put the State of Texas in a
13 squeeze play, okay. I know what a squeeze play is, I'm not
14 trying to do that.

15 *(Interruption, phone ringing.)*

16 THE COURT: Who are you, sir?

17 MR. BRYANT: My name is David Bryant.

18 THE COURT: No, I know who you are. I'm talking about
19 the gentleman behind you.

20 MR. BRYANT: Mr. Sullivan.

21 THE COURT: Mr. Sullivan, I know it wasn't you. That
22 was Governor Abbott on the phone, he was sabotaging me. I
23 don't think so. Actually, Governor Abbott is quite a nice guy.
24 I've had a chance to meet him before. And not that it's
25 neither here nor there, but Senator Cornyn is a good friend of

1 mine, he and I went to the same law school and I've known
2 Senator Cornyn for a long time. And before I came to sit in
3 the Western District of Texas, I went to Senator Cornyn first
4 and asked whether he had any objection at all to my coming. He
5 said, "*Absolutely not.*" If he had said yes, I would not be
6 here. And he and I have remained good friends. So I don't
7 know Governor Abbott that well, I just got a chance to meet him
8 once and he was a very delightful guy when I met him. So I
9 have nothing against Governor Abbott, and nothing in my order
10 should ever be construed as any personal attack on him,
11 absolutely not. He's doing what he thinks is right for the
12 people of Texas and that's his job. My job is not to do what's
13 right for the people of Texas or the people of the United
14 States, it's to do what's right for the law and for the
15 Constitution, and hopefully that's right for the people,
16 hopefully. So please don't think that I'm trying to work
17 against Texas here. The United States is in the same squeeze
18 box that you are. Okay?

19 And I'm not trying to somehow cut off the Court of
20 Appeals with their en banc ruling. I had made this decision to
21 do this, to move it forward before they went en banc. I knew
22 they were going to go en banc in this case. Anybody who has
23 any understanding of what is going on in the Fifth Circuit
24 there would know that with Judge Willett filing such a strong
25 dissent, there was a likelihood that there would be people on

1 the Fifth Circuit who would say, *Let's take another look at*
2 *this, maybe Judge Willett is right.* Is that a surprise? It
3 wasn't a surprise to me. I'm sure it wasn't even a surprise to
4 the United States. They argued against it, but unsuccessfully.
5 Okay.

6 MR. WALTERS: Your Honor, if I could just one request
7 procedurally.

8 THE COURT: Sure.

9 MR. WALTERS: We would propose that the plaintiff
10 disclose their experts and witnesses first to give us an
11 opportunity to then respond.

12 THE COURT: That's why I told them within five days.

13 MR. WALTERS: So it's just for the plaintiff, Your
14 Honor?

15 THE COURT: Yes, of course. Yes?

16 MS. KIMBALL: Are there further deadlines that the
17 Court is setting?

18 THE COURT: Yes, we're going to give you those now.

19 COURTROOM DEPUTY CLERK: Discovery, February 16th.

20 MS. KIMBALL: Is that fact discovery closing or all
21 discovery?

22 THE COURT: These experts need to write their reports,
23 which I think they need to understand they've got a deadline
24 here, so I think general fact discovery, February 16th. I know
25 it sounds like, gee wiz, that's only like a month away, little

1 less than a month away, but you have to remember that a lot of
2 this has already been done. This has already been done, so
3 this is round two, so to speak, not round one. And then for
4 your expert discovery for depositions for the experts, I would
5 say the end of February.

6 MS. KIMBALL: So, Your Honor, that's the close of
7 expert discovery?

8 THE COURT: Yes, the reports have to be written and
9 turned in and expert discovery has to be completed by the end
10 of February.

11 COURTROOM DEPUTY CLERK: February 29th.

12 THE COURT: So those expert reports should be in a
13 week ahead of that.

14 COURTROOM DEPUTY CLERK: February 22nd.

15 THE COURT: I'll give you until February 29th to turn
16 in -- when is the trial?

17 COURTROOM DEPUTY CLERK: March 19th.

18 THE COURT: What is March 5th?

19 COURTROOM DEPUTY CLERK: March 5th is a Tuesday.

20 THE COURT: I'll give you until March 5th to turn in
21 your proposed findings of fact and conclusions of law.

22 COURTROOM DEPUTY CLERK: Pretrial submissions will be
23 March 11th, and objections to pretrial submissions will be
24 March 13th.

25 THE COURT: I'm going to try to get my ruling on the

1 Hidalgo issue. And what was the other issue? There was one
2 other issue.

3 MR. WALTERS: The other purely legal question in there
4 is whether there's a cause of action against the State of Texas
5 under the Rivers and Harbors Act, Your Honor.

6 THE COURT: Okay. I think the Supreme Court has
7 already kind of addressed that, but all right. I think there's
8 some Supreme Court law on that issue. Anything else?

9 COURTROOM DEPUTY CLERK: I set it for the four days.

10 THE COURT: And we've set it for four days, trial for
11 four days. If it takes a little longer, it takes a little
12 longer. I spend 99 percent of my time here now. Judge Yeakel
13 retired on us, so it's just Judge Pitman and me, so I'll be
14 here. Anything else?

15 MR. WALTERS: I think we've said our peace, Your
16 Honor.

17 THE COURT: You said your peace? No, you haven't.
18 You're going to have plenty of opportunity to say it. Look, I
19 have a great deal of respect for the United States Attorney's
20 Office and Department of Justice, but I should have it be known
21 that I have a great deal of respect for the State Attorney
22 General's Office. They have presented some very fine
23 presentations and won cases in my court on more than one
24 occasion over the last 12 years, so I have no -- I think I'm
25 very fortunate in this case to have good lawyers on both sides.

1 This is not one of those cases where I'm going, *Oh, my God*. So
2 thank you very much and you'll be hearing from me soon on those
3 motions and then you can file your answer. And I'd like your
4 answer to be filed very quickly and any counterclaim very
5 quickly. Okay? Don't sit on it if you're going to file one.
6 Anything else? No? No?

7 MS. KIMBALL: No, Your Honor. Thank you.

8 COURT SECURITY OFFICER: All rise.

9 (12:00 p.m.)

10 * * *

* * * * *

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: January 21, 2024

/s/ Angela M. Hailey

Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter
262 West Nueva Street
San Antonio, Texas 78207
(210) 244-5048